

Rec'd 11/21/18 JH

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TULARE COUNTY SUPERIOR COURTS
STATE OF CALIFORNIA, VISALIA DIVISION

In Re SEARCH WARRANT #013487

CASE NO: _____

YORAI BENZEEVI,

Moving Party,

REAL PARTY IN INTEREST'S
RESPONSE TO DR. YORAI
BENZEEVI'S SURREPLY IN
SUPPORT OF RETURN OF SEIZED
PROPERTY AND RELATED
EVIDENTIARY HEARING

v.

SUPERIOR COURT OF THE COUNTY OF
TULARE,

Respondent,

TULARE COUNTY DISTRICT ATTORNEY,

Real Part in Interest.

Date: November 9th, 2018
Time: 2:00 pm
Dept: 13

Respondent, the People of the State of California, by and through their attorneys, TIM WARD, District Attorney, and TREVOR HOLLY, Deputy District Attorney, submit this REAL PARTY IN INTEREST'S RESPONSE TO DR. YORAI BENZEEVI'S SURREPLY IN SUPPORT OF RETURN OF SEIZED PROPERTY AND RELATED EVIDENTIARY HEARING related to search warrant #013487. This motion is based upon the pleadings, points and authorities, evidence, and argument presented at the hearing of the matter.

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3 **ARGUMENT AND AUTHORITY**
4

5 **INTRODUCTION**
6

7 The Movant has made the bold claim that stolen property seized pursuant to a
8 validly issued warrant should be returned to Dr. Benzeevi at his request, without a hearing or
9 any evidence being presented by either party. The claim appears to be based on a
10 misunderstanding of Evidence Code section 637, which states that there is a presumption that
11 things possessed by a person are presumed to be owned by him. However, an evidentiary
12 presumption is not evidence (Evid. Code § 600(a)). Such a presumption is only applicable in
13 an actual evidentiary hearing and ceases to exist once rebutted by other evidence (Evid. Code
14 § 604, *Estate of Trikha* (2013) 219 Cal. App. 4th 791, 803, 804).

15 The Movant has also re-iterated his claim that tracing funds requires
16 identifying individual dollars through each account they move through, and that merely
17 mixing stolen funds with other funds prevents the funds from being identified and recovered.
18 As discussed in our previous motion, this is not the law and Movant has cited no supporting
19 case law that this is the case.

20 Movant has now made an entirely new motion claiming that the probable cause
21 affidavit is false and misleading. This allegation, manifestly false, is of no relevance to the
22 current proceeding. Stolen property is contraband, and cannot be returned to the one who
23 stole it (*People v. Superior Court (McGraw)* (1979) 100 Cal.App.3d 154, 157). His
24 allegations appear to primarily contend that the Management Services Agreement allows the
25 transactions. No contract can approve conduct which is unlawful, including self-dealing
26 contracts in violation of the California's Conflict of Interest Law. No contract can legitimize
27 a theft and misappropriation of public funds by a public employee from TRMC, nor can it
28 authorize a theft from a third party, such as Celtic Finance. The TAM account was properly

1
2 characterized as belonging solely to Dr. Benzeevi, and the deposit of funds from the sale of
3 taxpayer property into an account solely controlled by Dr. Benzeevi was absolutely improper.

4
5 I. NO RULING CAN BE MADE UNTIL BOTH SIDES HAVE HAD AN OPPORTUNITY
6 TO PRESENT ACTUAL EVIDENCE ON THE ISSUE.

7 The funds in the Chase Bank accounts were seized pursuant to a search warrant
8 issued on a finding by a Judge that probable cause existed to believe the funds were stolen.
9 A search conducted pursuant to a warrant is presumed to be valid. (*Theodor v. Superior Court*
10 (1972) 8 Cal.3d 77, 101, *People v. Amador* (2000) 24 Cal.4th 387, 393). Statutory law and
11 case law clearly establish that stolen or embezzled property should be seized and returned to
12 its rightful owner (PC § 1407, PC § 1408, and PC § 1409). “Clearly, the People have the right
13 to detain any property which it is unlawful to possess..” (*People v. Superior Court (McGraw)*
14 (1979) 100 Cal. App. 3d 154, 157). Therefore, no action can be taken by the Court until a full
15 evidentiary hearing has been held, at which both sides have an opportunity to present relevant
16 evidence on the issue. (*People v. Ivenditti* (1969) Cal. App. 2d 178, 180).

17 The Movant makes an argument that Evidence Code section 637 somehow
18 trumps the search warrant and that the unlawfully obtained funds must be returned to him
19 immediately. Evidence Code section 637 falls under Division 5, Article III of the California
20 Evidence Code, entitled “Presumptions Affecting The Burden of Presenting Evidence”.
21 Evidence Code section 600(a) states that a presumption is not evidence. Evidence Code
22 section 604 states that the effect of the burden of producing evidence is to require the trier of
23 fact to assume the existence of a presumed fact until evidence is submitted to rebut it. The
24 phrase trier of fact is significant as it establishes that the presumption has no effect outside of
25 an actual evidentiary hearing.

26 When sufficient evidence is presented to rebut a presumption, it ceases to
27 operate. “Thus, a presumption affecting the burden of producing evidence requires the trier of
28 fact to assume the existence of the presumed fact unless contrary evidence is introduced. Once

1 evidence negating the presumed fact is presented, the trier of fact must decide the case under
2 the applicable burden of proof without regard to the presumption “simply by weighing the
3 evidence.” (*Estate of Trikha*, 219 Cal. App. 4th 791, 803–04, 162 Cal. Rptr. 3d 175, 184
4 (2013)). Because the presumption vanishes once rebutted, once it is established that the
5 money received from Celtic is stolen, Dr. Benzeevi is not entitled to a presumption that the
6 funds in his account are legitimate funds, not stolen funds.
7

8 If the Court finds the need to issue an immediate ruling on whether the funds
9 are stolen property or not, the People are prepared to put on our first witness at the date of this
10 hearing. We anticipate a lengthy hearing, with over twenty witnesses, the number of
11 witnesses varying depending on the number of stipulations and evidentiary rulings by the
12 Court.

13 II. THE FUNDS IN DR. BENZEEVI’S ACCOUNT ARE DIRECTLY TRACEABLE
14 TO THE CELTIC TRANSACTIONS
15

16 Dr. Benzeevi has claimed that because of the fungibility of money it is
17 impossible that the money seized is identical to the money stolen. They then argue that even
18 though the balance never dropped below the seized amount, it was the stolen money that was
19 spent first, and therefore the remaining balance cannot be seized. This argument has been
20 rejected by courts throughout the nation. (*U.S. v. Check No. 25128 in Amount of \$58,654.11*
21 (9th Cir. 1997) 122 F. 3d 1263, 1264, *United States v. Banco Cafetero Panama*, (2nd Cir.
22 1986) 797 F.2d 1154, 1161, *People v. Mays* (2007) 148 Cal. App. 4th 13, 32). These cases
23 deal directly with the fungibility of money and how illicit funds should be traced, and
24 therefore directly contradict the theory advanced by the Movant.

25 California law explicitly adopts the public policy that stolen funds should be
26 seized and preserved for their return to the rightful owner. (PC 1524(a), PC § 1407, PC §
27 1408, PC § 1409, *People v. Superior Court (McGraw)* (1979) 100 Cal. App. 3d 154). The
28 Movant’s argument would frustrate this policy, by allowing any thief to keep the proceeds of
their crimes merely by moving the money into an account containing other funds. The
Movant asks the Court to adopt entirely new law, in opposition to established law, and against

1 the established intent of PC § 1524(a). The Court should refuse to do so.

2
3 III. MOVANT HAS MADE AN ENTIRELY NEW, SEPARATE, AND INACCURATE
4 “FRANKS” MOTION THAT SHOULD BE DISMISSED.
5

6 The Movant has tacked on to their motion a new motion that appears to
7 demand a Franks hearing, which is conducted under California law pursuant to Penal Code
8 section 1538.5(a)(1)(iii-v). PC 1538.5(f)-(h) provides that 1538.5 motions may be made after
9 a felony complaint or indictment, or after a misdemeanor complaint has been filed. In this
10 case, no complaint has been filed and the motion may not be heard. The motion is also moot,
11 as stolen property is contraband, and may not be returned even if the search warrant is found
12 invalid (*Aday v. Superior Court* (1961) 55 Cal. 2d 789, *People v. Superior Court (McGraw)*
13 (1979) 100 Cal. App. 3d 154). The Court should dismiss the portion of the motion alleging
14 inaccuracies regarding the probable cause statement, and require Movant to file a separate
15 motion under the appropriate law.

16 IV. MOVANT HAS FAILED TO STATE ALLEGATIONS SUFFICIENT TO TRIGGER
17 A FRANKS HEARING.
18

19 A search conducted pursuant to a search warrant is presumed lawful. Thus, the
20 burden of establishing the invalidity of the search warrant rests upon the defendant. (*Theodor*
21 *v. Superior Court* (1972) 8 Cal.3d 77, 101.) This burden extends to both a motion to quash
22 and to a motion to traverse a search warrant. (*People v. Amador* (2000) 24 Cal.4th 387, 393.)

23 Both the magistrate and reviewing courts are to interpret an affidavit for a
24 search warrant in a common sense and realistic fashion. (*Illinois v. Gates* (1983) 462 U.S.
25 213, 238; *United States v. Ventresca* (1965) 380 U.S. 102, 108.) The issuing magistrate’s task
26 is to make a practical and common-sense decision whether, given all the information
27 contained in the affidavit, “there is a fair probability that contraband or evidence of a crime
28 will be found in a particular place.” (*Illinois v. Gates*, supra, at p. 238.) “Because they are
often written by nonlawyers in the midst of an investigation, technical requirements for
elaborate specificity have no place in the review of search warrant affidavits.” (*People v.*

1 *Varghese* (2008) 162 Cal.App.4th 1084, 1103.)

2 Where false statements are alleged, a defendant is only entitled to a Franks
3 evidentiary hearing on a search warrant's affidavit only after making a substantial preliminary
4 showing that (1) the affidavit includes a false statement made "knowingly and intentionally,
5 or with reckless disregard for the truth," and (2) "the allegedly false statement is necessary to
6 the finding of probable cause." (Id. at pp. 155-156; see also *People v. Hobbs* (1994) 7 Cal.4th
7 948, 974; *People v. Luttenberger* (1990) 50 Cal.3d 1, 9-11.) "Because of the difficulty of
8 meeting the 'substantial preliminary showing' standard, Franks hearings are rarely held."
9 (*People v. Estrada* (2003) 105 Cal.App.4th 783, 790.)

10 The procedural and substantive rules established in *Franks v. Delaware* (1978)
11 438 U.S. 154 (*Franks*) apply equally to alleged omissions from affidavits. (*People v. Huston*
12 (1989) 210 Cal.App.3d 192, 219; see also *People v. Truer* (1985) 168 Cal.App.3d 437, 440-
13 443; *People v. Luevano* (1985) 167 Cal.App.3d 1123, 1128-1129.) "A defendant who
14 challenges a search warrant based on omissions in the affidavit bears the burden of showing
15 an intentional or reckless omission of material information that, when added to the affidavit,
16 renders it insufficient to support a finding of probable cause." (*People v. Scott* (2011) 52
17 Cal.4th 452, 484, italics in original; see also *People v. Lee* (2015) 242 Cal.App.4th 161, 171-
18 172.) Because the defense bears the burden of proof by a preponderance of the evidence, the
19 defendant must establish that an omission was made knowingly or intentionally, or with
20 reckless disregard for the truth, and that the omission was of a material fact distorting the
21 probable cause analysis. (*Franks*, supra, at pp. 155-156; *People v. Huston*, supra, at p. 220;
22 *People v. Berkoff* (1985) 174 Cal.App.3d 305, 310.) Hence, negligent or innocent omissions
23 have no effect upon the validity of the warrant. But even where an intentional omission of a
24 material fact is shown, the remedy simply is to add the omitted information to the affidavit
25 and test it again for probable cause. (*People v. Mayer* (1987) 188 Cal.App.3d 1101, 1120-
26 1121.)

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V. MOVANT'S COMPLAINT ABOUT THE TAM ACCOUNT AND THE MSA ARE
BOTH IRRELEVANT AND INACCURATE

There are two distinct unlawful takings that occur during the Celtic Finance

1 transaction. The first is the theft and unlawful transfer of three million dollars of hospital
2 equipment from TRMC to Celtic Finance by Dr. Benzeevi. This was an embezzlement as Dr.
3 Benzeevi's authority had been stripped from him at the 07/27/17 Board Meeting. Dr.
4 Benzeevi intended that the proceeds would go to his company, so this was also an
5 embezzlement because it was a self-interested sale that violated the bylaws of TRMC, his
6 fiduciary duties, and California's Conflict of Interest laws. Therefore, this transaction was a
7 theft of three million dollars of taxpayer property, as well as an unlawful misappropriation of
8 public funds, and a felony violation Government Code section 1090.

9 Dr. Benzeevi and Alan Germany made a series of misrepresentations to Celtic
10 Finance in order to sell them the equipment and obtain the lease for the equipment, which
11 were contingent transactions. Several of these false representations are listed in the redacted
12 portion of the search warrant on pages 5 and 6. One of the key misrepresentations was that
13 the money would go to TRMC, when in reality Dr. Benzeevi and HCCA had complete
14 ownership of the TAM account the proceeds of the sale went into. The hospital had no
15 ownership interest or control over the account. Celtic Finance stated that they would not have
16 gone forward with the transaction if they would have known this, and this misrepresentation is
17 sufficient for establishing probable cause on its own. The reason for this is obvious: the CEO
18 negotiating the sale of public goods, placing the proceeds of the sale into an account solely
19 controlled by the CEO, indicates fraudulent activity is taking place, and is an obvious conflict
20 of interest, is wildly unethical, and a clear violation of California law (G.C. § 1090(a), G.C.
21 § 87100).

22 The TAM account is not the "Master Account" for the hospital as per the
23 MSA, as the day to day operations are paid of the hospital are paid out of the TRMC Bank of
24 Sierra account. J. Duross O'Bryan's Declaration is not evidence, as he has no personal
25 knowledge of the account, and an expert witness cannot render an opinion unless he takes the
26 stand, is qualified as an expert, and subject to cross examination. The search warrant affidavit
27 accurately stated the TAM account was owned by HCCA, which is one hundred percent
28 owned by Dr. Benzeevi, and that this fact was misrepresented to Celtic. The MSA between
TRMC and HCCA is irrelevant and cannot give permission to defraud Celtic Finance.

The most glaring and obvious flaw in all of the Movant's arguments is that this
is not an arm's length transaction, and Dr. Benzeevi is not a mere businessman entitled to

1 pursue mercenary self-interest. He is a public employee, a CEO of a public hospital,
2 entrusted with taxpayer property to be used to safeguard the health and safety of the citizenry.
3 He violated that trust engaging a self-interested transaction that breached his ethical,
4 fiduciary, and legal duties to the public. No contract may be read to allow that which is
5 unlawful (Restatement (First) of Contract § 548 (1932)), and therefore no interpretation of the
6 MSA that would permit this transaction is valid.

7
8 VI. RESOLUTION 852 WAS ADEQUATELY DESCRIBED IN THE WARRANT AND
9 THERE IS NO EVIDENCE OF ANY INTENTIONAL MISREPRESENTATION.

10 The warrant accurately states that Resolution 852 was passed in June of 2017
11 authorizing Dr. Benzeevi to seek emergency financing for TRMC. Several Board Members
12 were interviewed and stated their understanding of the Resolution. The Resolution does not
13 mention HCCA or any intention that HCCA receive the funds. If Dr. Benzeevi were being
14 honest in his dealings, one must wonder why he did not state that some, or all, of the money
15 would go to HCCA. HCCA is not a mere vendor or lender; it is the manager of the hospital
16 and the CEO's company. It is unlikely that the Board would approve of HCCA, and no other
17 vendor or lender, being paid. If there is any deception here, it was in the presentation of the
18 Resolution by Dr. Benzeevi to the Board. It should also be noted that any Resolution
19 submitted to the Board by the CEO, intended to benefit the CEO's company, would be void as
20 a violation of Government Code section 1090(a) and would also be a violation of the
21 District's Bylaws.

22 The description of Resolution 852, although not containing every detail of the
23 Resolution, was accurate. Knowledge of the full resolution would have had no effect on
24 probable cause and there is no credible evidence that not including the entirety of the
25 document was intended to deceive.

26 VII. THE ACTS OF THE DULY ELECTED BOARD

27 The warrant accurately states that the Board revoked Dr. Benzeevi's authority
28 to seek financing at the 07/27/17 Board Meeting. It also accurately relates Dr. Benzeevi's
refusal to acknowledge their authority and his specious use of Election Code section 15400.
The warrant accurately states that there was a regularly scheduled Board Meeting on

1 08/23/17. The Board announced their intention to again revoke Dr. Benzeevi's authorization
2 by placing that item on the agenda. Bruce Greene, who at the same moment was actively
3 representing HCCA¹, canceled the meeting on his own authority. The Board Members were
4 locked out of the meeting room and only held a truncated meeting, mostly in closed session.

5 The warrant accurately states the Board intention to de-authorize the loan, to
6 the extent that it can be read as implying a resolution has was passed, it is in error. However,
7 the error is of unartful language, rather than an intentional misrepresentation. It is also
8 irrelevant here, as the resolution was revoked at the 07/27/17 meeting and there is ample other
9 evidence that provides probable cause.

10 Movant makes the startling claim that Judge Reed ruled that Senovia Gutierrez
11 was not a Board Member. The actual ruling of Judge Reed is in page 7, 8, and is re-iterated
12 on page 33 of the September 18th, 2017 transcript. The Judge ruled that the People had not
13 joined the property parties and that the Court could not provide the relief sought. However,
14 the Judge did state that on page 14 that;

15 "That's correct. According to the Brown v. Hite case cited by opposing counsel, the
16 candidate is elected as of the date of the election, not the date of the declaration."²

17 Unfortunately, the above was not the Judge's ruling, merely a part of oral
18 argument plucked from a lengthy transcript. Judge Reed spent significant time allowing the
19 attorneys to present and debate their views on the case. The Judges and attorneys comments
20 during the argument are not evidence of anything, carry no legal force, and it would have
21 been improper to cite any of the argument in a search warrant. The ruling was on procedural
22 grounds, and therefore has no bearing as to whether or not Mrs. Gutierrez was a fully
23 empowered Board Member as of 07/27/17, when the Board revoked Dr. Benzeevi's
24 authorization to obtain a loan.

25 It is very disturbing that the Movant believed they could cherry pick one

26 ¹ See "Supplemental Declaration of Bevan A. Dowd In Support of Dr. Yoria Benzeevi's Surreply to
27 Motion For Return of Siezed Property and Related Property and Related Evidentiary Hearing" Exbt. 22,
pg 1.

28 ² (Declaration of Bevan Dowd in Support of Notice of Motion and Motion of Dr. Benzeevi For Return
of Seized Property And Related Evidentiary Hearing 10/05/18, Exhibit 16, Transcript VCU271086
hearing on 09/18/17)

1 statement during oral argument and use it to convince the Court that Judge Reed ruled that
2 Senovia Gutierrez was not a valid Board Member and that subsequent meetings were invalid.
3 As the Court stated on pages 7, 8, and 33 of the hearing transcript, the Court's ruling was
4 based on narrow procedural grounds, and no ruling as to the underlying facts was made. It is
5 worth noting that the Court did not dismiss the case. The Court dismissed the request for ex
6 parte relief, as stated on pages 13 line 16-20 of the transcript.

7 8 VIII. THE CELTIC LOAN CONTRACT AND THE "BENEFIT" TO THE HOSPITAL

9 The warrant sufficiently establishes that Dr. Benzeevi fraudulently obtained
10 the sale/lease transaction from Celtic Finance. Some of this information, appearing on pages
11 6 and 7 has been redacted, but provide relevant information as to why the transaction was
12 fraudulent. As discussed previously, Dr. Benzeevi also lacked authority to enter into this
13 agreement. He misrepresented that the money would actually go to TRMC, when in reality he
14 diverted the money directly into an HCCA account controlled by him. Celtic Loan would not
15 have agreed to the transaction if they had known this. The defense claim that there is
16 insufficient evidence that the funds from Celtic Loan were not obtained via fraud simply has
17 no merit.

18 The Movant then attempts to claim the transaction benefited the hospital. This
19 transaction consisted of a CEO of a public hospital, owned by the taxpayers, selling three
20 million dollars of tax payer property and then transferring the proceeds into an account under
21 his sole control. He then transfers approximately four hundred and ninety thousand dollars to
22 his attorney, who is actively representing Dr. Benzeevi's company at that time in the Celtic
23 Finance transaction. He keeps the lion's share for himself, transferring two million four
24 hundred thousand dollars to his personal account. The hospital went bankrupt less than thirty
25 days after Dr. Benzeevi received the money. There is no interpretation of this transaction
26 other than it was for the sole benefit of Dr. Benzeevi.

27 28 IX. CONCLUSION

The People and the Court have a duty to seize stolen property and return said

1 property to its rightful owner. A defendant is never entitled to the return of seized
2 contraband, including property that is unlawfully possessed or stolen (*People v. Superior*
3 *Court (McGraw)* (1979) 100 Cal. App. 3d 154). Property, including money, need not be
4 returned where there is probable cause to believe it is the fruit of an illegal transaction,
5 making it subject to forfeiture under California or federal law. (*People v. \$48,715* (1997) 58
6 Cal.App.4th 1507; *People v. \$497,590* (1997) 58 Cal.App.4th 145.)

7 A CEO of a publicly owned entity simply cannot sell three million dollars
8 worth of public property and keep the proceeds for himself. Such a transaction inherently
9 violates both Government Code section 1090 and Penal Code section 424(a)(1). Further,
10 these transactions were done expressly against the wishes of the elected Board and contrary to
11 their vote on 07/27/17 to rescind Dr. Benzeevi's authority to enter into the transaction. Dr.
12 Benzeevi, Alan Germany, and HCCA made material misrepresentations to obtain the three
13 million dollars from Celtic and the money Dr. Benzeevi received into his account is the
14 product of theft by false representation. He cannot clean his ill-gotten gains merely by
15 commingling it with legitimate funds. The money seized from his account is stolen and the
16 Court is duty bound to maintain custody of the funds until their return to their legitimate
17 owner.

18 The Movant's so called "Franks" motion is premature as no charges have been
19 filed. Even if recognized, they have failed to carry their burden the show that any
20 intentionally false statements or intentionally misleading omissions were made. Even if their
21 allegations were true, none of them would have resulted in shifting the probable cause
22 analysis. Therefore, we ask the Court to reject the Movant's Franks claims, set the
23 evidentiary hearing, and preserve the assets in Dr. Benzeevi's accounts for their rightful
24 owner.

25 Dated: 11/02/2018

26 Respectfully submitted,

27 TIM WARD
28 DISTRICT ATTORNEY


TREVOR HOLLY
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